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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA
10

11 UNITED STATES OF AMERICA,)	No. CR-08-0272 SI
)	
12 Plaintiff,)	DEFENDANT'S MOTION IN LIMINE TO
)	EXCLUDE CERTAIN INFORMATION
13 v.)	FROM 2001 ORDER OF REMOVAL
)	
14 CELSO MARTEARENA-ARRIOLA,)	
)	
15 Defendant.)	

16
17 **I. BACKGROUND**

18 On June 6, 2008, the government disclosed its intent to seek the admission at trial of a
19 2001 Notice and Order of Expedited Removal regarding Defendant. *See* Bates CMA0053-54.
20 Defendant agreed to stipulate to the authenticity of the document and its admissibility as a public
21 record with certain restrictions. Specifically, Defendant objected to the admission of certain
22 information contained within the document, including the statement that Defendant had been
23 convicted of an aggravated felony and the factual bases for the INS's determination of
24 inadmissibility. After meeting and conferring, the parties agreed to redact the majority of the
25 information to which Defendant objected.

26 One piece of disputed information remains, however. Specifically, the Defendant objects

1 to the admission of the following statement contained in the 2001 removal order: "You falsely
2 represented yourself to be a United States citizen" Bates CMA0054. Because this
3 information is irrelevant and highly prejudicial, Defendant respectfully requests that this Court
4 order its exclusion from evidence at trial.

5 II. DISCUSSION

6 In a prosecution for illegal-reentry, the government "has the burden of proving the
7 element of a prior deportation." *United States v. Medina*, 236 F.3d 1028, 1030 (9th Cir. 2001).

8 With respect to this element, "the government merely needs to prove that a deportation
9 proceeding actually occurred with the end result of [the defendant] being deported." *Id.* at 1031.
10 The government does not have to establish the lawfulness of the underlying deportation. *See id.*
11 at 1030 ("[T]he lawfulness of the prior deportation is not an element of the offense.").

12 Moreover, the Ninth Circuit has held that a deportation order or warrant may adequately serve to
13 demonstrate that the respective deportation or removal proceeding "actually occurred." *Id.*

14 Since the government need not prove the lawfulness or validity of the immigration
15 proceeding that resulted in the 2001 removal order, the factual finding underlying in part the INS
16 determination of inadmissibility – *i.e.*, a false representation as to U.S. citizenship – also need not
17 be admitted in this trial. Further, whether the Defendant made a false representation while
18 attempting to gain entry to the United States does not tend to prove any element of a § 1326
19 violation. The Ninth Circuit has long held that illegal reentry under § 1326 requires "only a
20 showing of general intent because it was a *malum prohibitum* regulatory offense and the statute
21 did not otherwise specify an intent requirement for that crime." *United States v. Gracidas-*
22 *Ulibarry*, 231 F.3d 1188, 1190 (9th Cir. 2000) (citing *Pena-Cabanillas v. United States*, 394 F.2d
23 785 (9th Cir. 1968)).

24 On the other hand, admission of the evidence regarding a false representation would be
25 unfairly prejudicial and borders on the use of impermissible character evidence. If the jury were
26 presented with evidence that the Defendant is a dishonest person, there would be a substantial

risk of conviction on an improper basis as opposed to proof of the actual elements of the offense. *See United States v. Blackstone*, 56 F.3d 1143, 1146 (9th Cir. 1995) (“Evidence is prejudicial if it appeals to the jury’s sympathies, arouses its sense of horror, provokes its instincts to punish, or triggers other mainsprings of human action.”) (citation and internal quotation omitted); Fed. R. Evid., 1972 Advisory Committee Note (“‘Unfair prejudice’ . . . means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.”).

Accordingly, Defendant respectfully requests that this Court order the exclusion of the false representation evidence at issue. To that end, Defendant has attached as Exhibit A to this motion a redacted version of the 2001 Removal Order and requests that the Court only admit the document in this redacted form.

Dated: June 17, 2008

Respectfully submitted,

/s

BARRY J. PORTMAN
Federal Public Defender

EXHIBIT A

EXHIBIT A

Notice to Alien Ordered Removed/Departure Verification

File No: A91 761 305

Date: February 20, 2001

Alien's Full Name: MARTEARENA-Arriola, Celso

6/21/01

You have been found to be inadmissible to the United States under the provisions of section 212(a) of the Immigration and Nationality Act (Act) or deportable under the provisions of section 237 of the Act as a Visa Waiver Pilot Program violator. In accordance with the provisions of section 212(a)(9) of the Act, you are prohibited from entering, attempting to enter, or being in the United States:

- ☐ for a period of 5 years from the date of your departure from the United States as a consequence of your having been found inadmissible as an arriving alien in proceedings under section 235(b)(1) or 240 of the Act.
- ☐ for a period of 10 years from the date of your departure from the United States as a consequence of your having been ordered removed under any section of the Act other than section 235(b)(1) or 240, or of your having been ordered excluded under section 236 of the Act in proceedings commenced prior to April 1, 1997.
- ☐ for a period of 20 years from the date of your departure from the United States as a consequence of your having been found inadmissible and of your having been previously excluded, deported, or removed from the United States.
- ☒ at any time because in addition to having been found inadmissible, you have been convicted of a crime designated as an aggravated felony.

After your deportation or removal has been effected, if you desire to reenter the United States within the period during which you are barred, you must request and obtain permission from the Attorney General to reapply for admission into the United States. You must obtain such permission prior to commencing your travel to the United States. Application forms for requesting such permission may be obtained by contacting any United States Consulate or office of the United States Immigration and Naturalization Service.

WARNING: Title 8 United States Code, Section 1326 provides that it is a crime for an alien who has been removed from the United States to enter, attempt to enter, or be found in the United States during the period in which he or she is barred from so doing without the Attorney General's consent. Any alien who violates this section of law is subject to prosecution for a felony. Depending on the circumstances of the removal, conviction could result in a sentence of imprisonment for a period of from 2 to 20 years and/or a fine of up to \$250,000.

P. Mitchell, SDP/321

Signature of officer serving warning)

Acting Senior Immigration Inspector

(Title of officer)

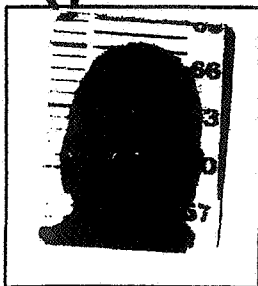
San Ysidro, California

(Location of INS office)

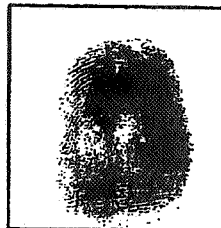
Verification of Removal

(Complete this section for file copy only)

Departure date 6/21/01	Port of departure SYS	Manner of departure A FOOT
Signature of verifying officer <i>[Signature]</i>	5267	Title of officer PEO



Photograph of alien removed

Right index fingerprint
of alien removed

[Signature]
(Signature of alien whose fingerprint and photograph appear above)

[Signature]
(Signature of official Taking fingerprint)

Form I-296 (6-1-97)

CMA0053

Notice and Order of Expedited Removal

DETERMINATION OF INADMISSIBILITY

File No: A91 761 305

Date: February 20, 2001

In the Matter of: MARTEARENA-Arriola, Celso

Pursuant to section 235(b)(1) of the Immigration and Nationality Act (Act), (8 U.S.C. 1225(b)(1)), the Immigration and Naturalization Service has determined that you are inadmissible to the United States under section(s) 212(a) ☐ (6)(C)(i); ☒ (6)(C)(ii); ☒ (7)(A)(i)(I); ☐ (7)(A)(i)(II); ☐ (7)(B)(i)(I); and/or ☐ (7)(B)(i)(II) of the Act, as amended, and therefore are subject to removal, in that:

- On or about February 20, 2001, you applied for admission into the United States.
- You verbally declared yourself to be a citizen of the United States.
- You are a citizen and national of Mexico.
- You have no legal right to either enter, pass through, or remain in the United States.
- You falsely represented yourself to be a United States citizen and are not in possession of a valid entry document as is required by the Act.

P. Mitchell, SDP/321

Immigration Inspector

Name and title of immigration officer (Print)


Signature of immigration officer

**ORDER OF REMOVAL
UNDER SECTION 235(b)(1) OF THE ACT**

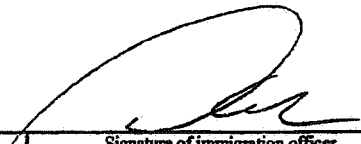
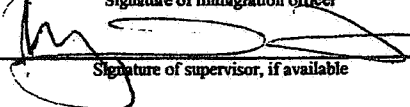
Based upon the determination set forth above and evidence presented during inspection or examination pursuant to section 235 of the Act, and by the authority contained in section 235(b)(1) of the Act, you are found to be inadmissible as charged and ordered removed from the United States.

D. Salazar, SII

Name and title of immigration officer (Print)

M. Partida, AAPD

Name and title of supervisor (Print)

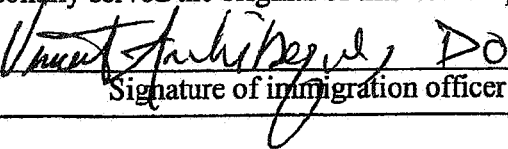

Signature of immigration officer

Signature of supervisor, if available

☐ Check here if supervisory concurrence was obtained by telephone or other means (no supervisor on duty).

CERTIFICATE OF SERVICE

I personally served the original of this notice upon the above-named person on

6/21/01
(Date)


Signature of immigration officer